

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WOLFIRE GAMES, LLC, William Herbert
and Daniel Escobar, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

VALVE CORPORATION,

Defendant.

Case No. 2:21-cv-00563-JCC

SEAN COLVIN, EVERETT STEPHENS,
RYAN LALLY, SUSANN DAVIS, and
HOPE MARCHIONDA, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

VALVE CORPORATION,

Defendant.

Case No. 2:21-cv-00650-JCC

**DEFENDANT VALVE CORPORATION'S
MOTION TO COMPEL ARBITRATION**

**NOTE ON MOTION CALENDAR:
September 17, 2021**

MOTION TO COMPEL ARBITRATION
(2:21-CV-00563-JCC) -

Fox Rothschild LLP
1001 FOURTH AVENUE, SUITE 4500
SEATTLE, WA 98154
206.624.3600

1 **I. INTRODUCTION**

2 Seven of the eight Plaintiffs are individual users of Valve’s online gaming platform—
 3 Steam—who purchased video games through Steam, using Steam accounts (the “Individual
 4 Plaintiffs”).¹ In purchasing games on Steam, the Individual Plaintiffs repeatedly agreed to
 5 Valve’s Steam Subscriber Agreement (“SSA”) and its requirement to arbitrate “all disputes and
 6 claims between us.” Yet, instead of commencing arbitration as agreed, they sued in court.
 7 Plaintiff Wolfire Games, LLC—a video game publisher—also joined their lawsuit. All eight
 8 Plaintiffs asserted identical claims against Valve based on the same alleged facts.

9 In a decision that was affirmed by the Ninth Circuit last year, this Court in another
 10 proposed class action against Valve evaluated the SSA’s arbitration agreement and held that it
 11 was valid and enforceable against Steam users who agreed to the SSA when making purchases
 12 on Steam—just like the Individual Plaintiffs here—or creating Steam accounts. *G.G. v. Valve*
 13 *Corp.*, No. C16-1941-JCC, 2017 WL 1210220 (W.D. Wash. Apr. 3, 2017), *affirmed in part and*
 14 *vacated in part*, 799 F. App’x 557, 558–59 (9th Cir. Apr. 3, 2020).

15 In compelling arbitration of claims Steam users brought against Valve (and claims their
 16 parents brought on their behalf) in *G.G. v. Valve*, this Court explained that “[t]he FAA reflects a
 17 ‘liberal federal policy favoring arbitration.’” 2017 WL 1210220, at *2 (quoting *AT&T Mobility*
 18 *LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). This Court went on to observe that “[t]he FAA
 19 requires courts to compel arbitration if (1) a valid agreement to arbitrate exists, and (2) the
 20 dispute falls within the scope of that agreement.” *Id.* (citing *Chiron Corp. v. Ortho Diagnostic*
 21 *Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). “If both of these two requirements are fulfilled,
 22 then the FAA ‘leaves no place for the exercise of discretion by a district court, but instead
 23 mandates that district courts shall direct the parties to proceed to arbitration.’” *Id.* (quoting
 24 *Chiron Corp.*, 207 F.3d at 1130). And “any doubts concerning the scope of arbitrable issues
 25

26 ¹ The Individual Plaintiffs are Sean Colvin, Susann Davis, Daniel Escobar, William Herbert, Ryan Lally, Hope Marchionda and Everett Stephens.

1 should be resolved in favor of arbitration, whether the problem at hand is the construction of the
 2 contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.*
 3 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985)).

4 Applying these principles, this Court compelled arbitration of all claims brought against
 5 Valve by or on behalf of Steam users. *Id.* at *3, 5. The Ninth Circuit affirmed. 799 F. App’x at
 6 558–59. Nothing has changed since the Ninth Circuit’s April 2020 decision.

7 The same arbitration agreement, the same logic, and the same Ninth Circuit authority
 8 lead to the same result here. Accordingly, Valve moves the Court for an order (1) compelling
 9 the Individual Plaintiffs to arbitrate all claims against Valve individually as they agreed in the
 10 SSA, and (2) staying all claims against Valve pending completion of arbitration, including all
 11 claims brought by Wolfire Games.

12 **II. STATEMENT OF FACTS**

13 **A. Valve and Steam.**

14 Valve develops and distributes video games and content for use on personal computers.
 15 Declaration of Christopher Boyd (“Boyd Decl.”) ¶ 2. Valve also operates Steam. Steam is an
 16 online platform that includes (1) an online store, where users can purchase subscriptions and
 17 licenses for video games that can be played online, digital content, and virtual items related to
 18 games, and (2) features such as matchmaking, achievement tracking, game updates, and a library
 19 to store games. *Id.*

20 **B. Every Steam User or Game Purchaser Agrees to the SSA.**

21 *1. All Users Agree to the SSA When Creating a Steam Account.*

22 Steam is free to use, but all users are required to first create a Steam account. Boyd Decl.
 23 ¶ 3; *G.G.*, 2017 WL 1210220, at *1. As part of the account-creation process, the user is
 24 presented with the SSA, which is also publicly accessible at any time at
 25 https://store.steampowered.com/subscriber_agreement/. Boyd Decl. ¶ 3. At all times since at
 26 least January 1, 2017, the SSA was (and continues to be) easily accessible on the account-

creation screen either because the entire SSA was presented on the same account creation screen or through a hyperlink to the words “Steam Subscriber Agreement” in the sentence requiring acceptance. *Id.* ¶ 5. It is impossible to create a Steam account unless the user affirmatively accepts the SSA by clicking a checkbox or button to indicate agreement:

Id. ¶ 4, Ex. A; *see also* *G.G.*, 2017 WL 1210220, at *1 (“A Steam account cannot be created unless the subscriber accepts the SSA.”).

2. All Purchasers Agree to the SSA Each Time They Purchase Games or Digital Content on Steam.

Purchases may be made on Steam only through a Steam account, created as discussed above. Boyd Decl. ¶ 6. All persons who purchase video games must agree anew to the SSA to complete each purchase. *Id.*, Ex. B; *see also G.G.*, 2017 WL 1210220, at *1.

Before Steam will allow a purchaser to complete any purchase of a video game—regardless of whether Valve or a third party developed and published the game—the purchaser must click a checkbox that states, “I agree to the terms of the Steam Subscriber Agreement.” Boyd Decl. ¶ 6. The SSA is hyperlinked to the words “Steam Subscriber Agreement” and is available with a single click. *Id.*, Ex. B. Purchasers cannot complete any purchase until they click the box to accept the SSA (*id.*) as shown here:

The screenshot shows the Steam checkout interface. At the top, there are tabs for 'Payment Info' and 'Review + Purchase'. A yellow banner states: 'You must agree to the terms of the Steam Subscriber Agreement to complete this transaction.' The product being purchased is 'Cattails - Become a Cat!' for \$3.74. The subtotal is \$3.74, tax (WA) is \$0.39, and the total is \$4.13. Below the price breakdown, it shows 'Earn Steam Points for this purchase' as 413. The payment method is 'Visa ending in [redacted] (Change)'. Gift options are set to 'None; this purchase is for your own account.' The billing address is redacted. The phone number is also redacted. The Steam account is 'colvinvalve'. At the bottom, there is a checkbox labeled 'I agree to the terms of the Steam Subscriber Agreement (last updated Aug 28, 2020.)' which is currently unchecked. A green 'Purchase' button is at the bottom right.

Boyd Decl., Ex. B at 3.

C. The SSA Requires Arbitration of All Disputes Between Steam Users and Valve.

The SSA grants Steam users a license to use Steam and the content and services available on Steam. Boyd Decl., Ex. E (“SSA”) ¶¶ 1(B), 2(A); *G.G.*, 2017 WL 1210220, at *1. But the granting of that license is conditioned upon Steam users’ agreement to arbitrate all disputes. The arbitration agreement is conspicuous, clear, and consumer-friendly, and every version of the SSA in effect during the proposed class period includes an arbitration provision and a notice of that provision in capital letters near the top of the first page. *See* Boyd Decl., Exs. C–E.

The SSA’s introductory paragraph directs Steam users to the arbitration provision: “SECTION 11 CONTAINS A BINDING ARBITRATION AGREEMENT AND CLASS ACTION WAIVER. IT AFFECTS HOW DISPUTES ARE RESOLVED. PLEASE READ IT.” SSA at 1.

Section 11 of the SSA is titled “DISPUTE RESOLUTION/BINDING ARBITRATION/CLASS ACTION WAIVER” and states in part, in capital letters:

YOU AND VALVE AGREE TO RESOLVE ALL DISPUTES AND CLAIMS BETWEEN US IN INDIVIDUAL BINDING ARBITRATION. THAT INCLUDES, BUT IS NOT LIMITED TO, ANY CLAIMS ARISING OUT OF OR RELATING TO: (i) ANY ASPECT OF THE RELATIONSHIP BETWEEN US; (ii) THIS AGREEMENT; OR (iii) YOUR USE OF STEAM, YOUR ACCOUNT, HARDWARE OR THE CONTENT AND SERVICES. IT APPLIES REGARDLESS OF WHETHER SUCH CLAIMS ARE BASED IN CONTRACT, TORT, STATUTE, FRAUD, UNFAIR COMPETITION, MISREPRESENTATION OR ANY OTHER LEGAL THEORY, AND INCLUDES ALL CLAIMS BROUGHT ON BEHALF OF ANOTHER PARTY.

It also explains that the FAA applies to the arbitration provision, and provides that the “[t]he arbitration will be governed by the Consumer Arbitration Rules (or the Commercial Arbitration Rules, if the Consumer Arbitration rules are inapplicable) of the American

1 Arbitration Association (‘AAA’) as modified by this Agreement.” SSA § 11. The SSA even
 2 hyperlinks to the AAA website for ease of access. *Id.*

3 Section 11 includes other consumer-friendly provisions and plain-language explanations
 4 of the parties’ arbitration agreement, such as:

- 5 • Agreeing that arbitration may be conducted by phone, on documents, or in
 6 person in the county where the Steam subscriber lives or at another agreed
 7 location. *Id.*
- 8 • Agreeing that for claims seeking \$10,000 or less, Valve will reimburse
 9 filing fees, pay a user’s share of AAA’s arbitration costs, and not seek its
 10 attorneys’ fees or costs unless the arbitrator determines the claims are
 11 frivolous or filed for harassment. *Id.*
- 12 • Describing the differences between arbitration and court proceedings in
 13 plain English. *Id.*
- 14 • Explaining that Steam users and Valve are waiving their rights to a trial in
 15 court. *Id.* (“YOU UNDERSTAND THAT YOU AND VALVE ARE
 16 GIVING UP THE RIGHT TO SUE IN COURT AND TO HAVE A
 17 TRIAL BEFORE A JUDGE OR JURY.”).

18 It also includes a conspicuous class action waiver and agreement to arbitrate claims
 19 individually:

20 D. Individual Binding Arbitration Only

21 YOU AND VALVE AGREE NOT TO BRING OR PARTICIPATE
 22 IN A CLASS OR REPRESENTATIVE ACTION, PRIVATE
 23 ATTORNEY GENERAL ACTION, WHISTLE BLOWER
 24 ACTION, OR CLASS, COLLECTIVE, OR REPRESENTATIVE
 25 ARBITRATION, EVEN IF AAA’S RULES WOULD
 26 OTHERWISE ALLOW ONE. THE ARBITRATOR MAY
 AWARD RELIEF ONLY IN FAVOR OF THE INDIVIDUAL
 PARTY SEEKING RELIEF AND ONLY TO THE EXTENT OF
 THAT PARTY’S INDIVIDUAL CLAIM. You and Valve also

1 agree not to seek to combine any action or arbitration with any other
2 action or arbitration without the consent of all parties to this
3 Agreement and all other actions or arbitrations.

4 This Agreement does not permit class, collective, or representative
5 arbitration. A court has exclusive authority to rule on any assertion
6 that it does.

7 *Id.*

8 **D. The Individual Plaintiffs Repeatedly Agreed to the SSA, Including Its**
9 **Arbitration Agreement.**

10 All of the Individual Plaintiffs allege that they purchased PC games through the Steam
11 store. Dkt. #34 (“Consol. Compl.”) ¶¶ 25–31. Two of the Individual Plaintiffs (Susann Davis
12 and Hope Marchionda) claim to have purchased games on Steam for their minor children, who
13 have their own Steam accounts. *Id.* ¶¶ 27, 30. Regardless of whether Plaintiffs Davis and
14 Marchionda created their own Steam accounts, they were required to agree to the SSA each time
15 they made a purchase on Steam. Boyd Decl. ¶ 6; *see also* G.G., 2017 WL 1210220, at *1. The
16 other Individual Plaintiffs do not claim to have purchased games on Steam for anyone other than
17 themselves (Consol. Compl. ¶¶ 25–26, 28–29, 31), indicating they have (i) created their own
18 Steam accounts and (ii) purchased games through Steam, as discussed above.

19 **E. Procedural Background and Plaintiffs’ Allegations.**

20 Ignoring their obligations in the SSA not only to arbitrate their disputes but to do so
21 individually, Plaintiffs purport to bring this suit as a class action on behalf of a class defined as
22 “[a]ll persons and entities who, directly or through an agent, purchased or sold a PC game on the
23 Steam Store in the United States and its territories from January 28, 2017 through the
24 present” Consol. Compl. ¶ 302. All eight Plaintiffs seek to represent that proposed class,
25 but all except Wolfire Games, the game developer and publisher, agreed not to bring or
26 participate in a class action. Plaintiffs alternatively suggest that the proposed class can be broken
into proposed subclasses of “game purchasers,” “non-subscriber game purchasers,” and “game
publishers.” *Id.* ¶ 303.

1 Plaintiffs' Consolidated Complaint alleges eight causes of action against Valve, including
 2 three Sherman Act Section 2 claims alleging monopolization, three Sherman Act Section 2
 3 claims alleging attempted monopolization, a Sherman Act Section 1 claim alleging unreasonable
 4 restraints of trade, and a claim alleging violation of the Washington Consumer Protection Act
 5 ("CPA"). In short, Plaintiffs claim that Valve's success in building a popular PC video game
 6 platform and its alleged efforts to give Steam users access to low prices make Valve a
 7 monopolist whose actions should be found illegal.

8 **III. ARGUMENT**

9 The arbitration agreement in the SSA was considered by this Court and the Ninth Circuit
 10 in *G.G. v. Valve* as recently as last year. Both courts held it was enforceable, and both courts
 11 held it required arbitration of claims brought against Valve by Steam-user plaintiffs. The
 12 Individual Plaintiffs here agreed to the SSA's arbitration agreement, just as the Steam-user
 13 plaintiffs did in *G.G. v. Valve*. Their agreement to arbitrate is just as enforceable here as the
 14 Steam users' agreement was in *G.G. v. Valve*. Accordingly, the Individual Plaintiffs should be
 15 compelled to individually arbitrate all claims, as agreed, and litigation of all claims should be
 16 stayed pending the outcome of arbitration, including those brought by Plaintiff Wolfire Games.

17 **A. The SSA's Arbitration Agreement Is Valid and Enforceable, and Requires** 18 **Arbitration of the Individual Plaintiffs' Claims.**

19 *1. This Court and the Ninth Circuit Both Enforced the SSA's Arbitration* 20 *Agreement to Require Arbitration of Claims Brought By Steam Users in* 21 *Another Recent Putative Class Action.*

22 This Court is familiar with the SSA's arbitration agreement. In *G.G. v. Valve*, a group of
 23 minors who were Steam users and their parents brought a proposed class action against Valve
 24 claiming it violated Washington gambling laws and the CPA through certain features and sales
 25 on Steam. 2017 WL 1210220, at *2. In granting Valve's motion to compel arbitration, this
 26 Court held:

- 1 • “The SSA has a binding and conspicuous arbitration agreement in Section 11” *Id.*
- 2 at *1.
- 3 • The minor Steam users agreed to the SSA and its arbitration agreement when they
- 4 created Steam accounts, then again every time they made purchases on Steam. *Id.* at
- 5 *1–2.
- 6 • “Plaintiffs’ procedural unconscionability argument is unpersuasive” because the
- 7 arbitration agreement was conspicuous and each party had an opportunity to understand
- 8 its terms. *Id.* at *3.
- 9 • That the arbitration agreement required the plaintiffs to pay the upfront costs of
- 10 arbitration, subject to reimbursement, did not make it substantively unconscionable.
- 11 *Id.*
- 12 • “The arbitration agreement with the minor Plaintiffs is valid.” *Id.*

13 The parties then individually arbitrated their claims, as agreed, and Valve prevailed in the
 14 individual arbitrations. On Plaintiffs’ appeal, the Ninth Circuit last year affirmed the order
 15 compelling arbitration of all claims brought by and on behalf of the Steam users who had agreed
 16 to the SSA, holding that “[t]he plaintiffs failed to show that the arbitration agreement itself is
 17 unenforceable based on waiver, equitable estoppel, or public-policy grounds.” *G.G.*, 799 F.
 18 App’x at 558 (internal citations omitted).²

19 As the Ninth Circuit held, the SSA’s arbitration agreement is valid and enforceable
 20 against Steam users and purchasers, all of whom have accepted it once or more. The Individual
 21 Plaintiffs fall within that group because they allege they “purchased PC Desktop Games through
 22 the Steam Store.” Consol. Compl. ¶¶ 25–31. While two of the Individual Plaintiffs, Davis and
 23 Marchionda, assert without pleading any supporting facts that they have “not agreed to the Steam
 24 Subscriber Agreement,” each admits that she “purchased PC Desktop Games through the Steam

25 _____
 26 ² The Ninth Circuit vacated the portion of the Court’s order compelling the parent plaintiffs to arbitrate their own
 individual claims because the parents—who neither had Steam accounts nor made any purchases on Steam—had not
 agreed to the SSA. *G.G.*, 799 F. App’x at 558.

1 Store for her minor child.” *Id.* ¶¶ 27, 30. The Boyd Declaration proves that each time one
 2 purchases a game on Steam—no matter whom it is for—one must agree to the SSA. Boyd Decl.
 3 ¶ 6, Ex. B.

4 Thus, all of the Individual Plaintiffs agreed to and are bound by the SSA, including its
 5 arbitration agreement, and should be required to individually arbitrate their claims, as agreed.

6 2. *Extensive Other Authority Supports Enforcement of the Individual*
 7 *Plaintiffs’ Arbitration Agreement in the SSA.*

8 Ninth Circuit authority and other decisions from this Court support the conclusion that
 9 the SSA’s arbitration agreement is just as enforceable against the Individual Plaintiffs here as it
 10 was in *G.G.*, where this court recognized the strong federal policy favoring arbitration. *See* 2017
 11 WL 1210220, at *2. The Ninth Circuit has embraced the strong public policy favoring
 12 arbitration by repeatedly enforcing arbitration agreements. *See, e.g., Balan v. Tesla, Inc.*, 840 F.
 13 App’x 303, 305 (9th Cir. Mar. 22, 2021); *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151,
 14 1159–60, 1162 (9th Cir. 2013); *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 934, 938 (9th
 15 Cir. 2013); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160–61 (9th Cir. 2012).

16 This Court has repeatedly enforced arbitration agreements in consumer contracts. *See,*
 17 *e.g., In re Wyze Data Incident Litig.*, No. C20-0282-JCC, 2020 WL 6202724, at *4 (W.D. Wash.
 18 Oct. 22, 2020) (Coughenour, J.) (enforcing clickwrap arbitration agreement and compelling
 19 arbitration in putative consumer class action asserting state common law and privacy claims);
 20 *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1174–75, 1178 (W.D. Wash. 2014)
 21 (Coughenour, J.) (compelling arbitration in a putative consumer class action and recognizing
 22 district court’s limited discretion to disregard valid arbitration agreements under *AT&T Mobility*
 23 and Ninth Circuit law); *Coppock v. Citigroup, Inc.*, No. C11-1984-JCC, 2013 WL 1192632, at
 24 *1, 10 (W.D. Wash. Mar. 22, 2013) (Coughenour, J.) (enforcing arbitration agreement in
 25 putative consumer class action asserting TCPA and FDCPA claims).
 26

1 This policy in favor of arbitration applies equally to the antitrust claims alleged here. *See*
 2 *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1103, 1115 (C.D. Cal. 2002) (compelling
 3 arbitration of Sherman Act claims and explaining, “[t]he general policy in favor of arbitration
 4 applies equally to antitrust claims”) (citations omitted); *accord Simula, Inc. v. Autoliv, Inc.*, 175
 5 F.3d 716, 723 (9th Cir. 1999). The U.S. Supreme Court’s decision in *American Express Co. v.*
 6 *Italian Colors Restaurant* leaves no doubt that an arbitration agreement with a class action
 7 waiver is just as enforceable in an antitrust case as in any other. 570 U.S. 228, 233–34 (2013).

8 As this Court recognized in *G.G.*, “[t]he FAA requires courts to compel arbitration if (1)
 9 a valid agreement to arbitrate exists, and (2) the dispute falls within the scope of that agreement.”
 10 2017 WL 1210220, at *2 (citing *Chiron Corp.*, 207 F.3d at 1130). The Ninth Circuit’s holding
 11 in *G.G.* that a valid arbitration agreement exists between Valve and Steam users satisfies the first
 12 requirement for enforcement. Whether this dispute falls within the scope of the SSA’s
 13 arbitration agreement (the second requirement) is a question of arbitrability delegated to the
 14 arbitrator by the incorporation of the AAA Consumer and Commercial Arbitration Rules into the
 15 SSA’s arbitration agreement, as the Ninth Circuit also held in *G.G.* *See* 799 F. App’x at 558
 16 (Steam users “clearly and unmistakably agreed to arbitrate questions of arbitrability because the
 17 arbitration agreement incorporates AAA rules”); *see also In re Wyze Data Incident Litig.*, 2020
 18 WL 6202724, at *3 (incorporation of AAA rules delegates issues of arbitrability to arbitrator).

19 When, as here, an arbitration provision satisfies these conditions, the FAA “leaves no
 20 place for the exercise of discretion by a district court, but instead mandates that district courts
 21 shall direct the parties to proceed to arbitration” *Dean Witter Reynolds, Inc. v. Byrd*, 470
 22 U.S. 213, 218 (1985) (emphasis in original); *see also G.G.*, 2017 WL 1210220, at *2 (same).
 23 Accordingly, the Court should compel individual arbitration of the Individual Plaintiffs’ claims.

1 **B. All Claims Should Be Stayed Pending Arbitration.**

2 1. The Individual Plaintiffs' Claims Should Be Stayed.

3 Section 3 of the FAA “requires courts to stay litigation of arbitral claims pending
4 arbitration of those claims in accordance with the terms of the agreement” *AT&T Mobility*,
5 563 U.S. at 344 (internal quotations omitted); *see also G.G.*, 2017 WL 1210220, at *5 (staying
6 case pending arbitration); *Coppock*, 2013 WL 1192632, at *10 (same). Accordingly, the Court
7 should stay the Individual Plaintiffs’ claims against Valve pending arbitration.

8 2. Wolfire Games' Claims Should Be Stayed Pending Arbitration.

9 The Court should also stay all proceedings on Wolfire Games’ claims while the
10 Individual Plaintiffs arbitrate their identical claims. All Plaintiffs pled the same claims and
11 damages based on the same facts, and all Plaintiffs seek to represent the same class. Allowing
12 Wolfire Games to proceed with its claims in this Court while the Individual Plaintiffs arbitrate
13 their claims in parallel proceedings would be wasteful and risk conflicting decisions. To
14 eliminate those inefficiencies and risks, and to vindicate the strong policy favoring arbitration,
15 the Court should stay Wolfire Games’ claims pending completion of the arbitrations of the
16 Individual Plaintiffs’ claims.

17 This Court’s inherent authority to manage its docket includes broad discretion to stay
18 litigation of Wolfire Games’ claims pending arbitration of the Individual Plaintiffs’ claims. *See*
19 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983) (“In some
20 cases, of course, it may be advisable to stay litigation among the non-arbitrating parties pending
21 the outcome of the arbitration. That decision is one left to the district court (or to the state trial
22 court under applicable state procedural rules) as a matter of its discretion to control its docket.”).

23 Courts routinely exercise their discretion to stay non-arbitrable claims that arise out of the
24 same facts as claims in arbitration or are otherwise intertwined with such claims. As Judge
25 Martinez explained:
26

In accordance with the FAA policy of staying any litigation that contravenes enforceable arbitration agreements, “if a suit against a nonsignatory is based upon the same operative facts and is inherently inseparable from the claims against a signatory, the trial court has discretion to grant a stay if the suit would undermine the arbitration proceedings and thwart the federal policy in favor of arbitration.”

T-Mobile USA, Inc. v. Montijo, No. C12-1317-RSM, 2012 WL 6194204, at *6 (W.D. Wash. Dec. 11, 2012) (staying claims of non-signatory to arbitration agreement pending outcome of arbitration because of overlapping issues and for considerations of judicial economy and efficiency) (citation omitted); *see also Sunlight Prod. Techs. v. MPOWERD*, No. CV-15-126-MWF, 2015 WL 12655479, at *6 (C.D. Cal. Sept. 17, 2015) (staying non-arbitrable claims where “the various claims asserted in both the arbitration and present litigation rely on the same set of core facts”); *Bates v. Morgan Stanley Smith Barney LLC*, No. CIV.S-09-3049-FCD/GGH, 2010 WL 3341819, at *6 (E.D. Cal. Aug. 25, 2010) (judicial economy supported stay of non-arbitrable claims where the outcome of the arbitration could “well impact those claims in this action” and “[a]llowing the two matters to proceed concurrently would unnecessarily risk inconsistent judgments and defeat efficiency”); *Bischoff*, 180 F. Supp. 2d at 1115 (staying non-arbitrable claims in putative antitrust class action given the “similarity of the issues of law and fact” and the “potential for inconsistent findings absent a stay”).

This case is precisely the situation in which the Court should exercise its discretion to stay Wolfire Games’ claims to promote the purposes of the FAA, further judicial economy, and avoid the risk of inconsistent judgments. Specifically:

- Wolfire Games’ claims rest on the same alleged facts and legal arguments as the claims of the seven Individual Plaintiffs.
- All eight Plaintiffs assert identical antitrust causes of action alleging that Valve violated Sherman Act Sections 1 and 2, as well as the CPA. Consol. Compl. ¶¶ 317–92.

- 1 • All Plaintiffs allege that Valve uses the same techniques to restrain trade, control
2 prices, and exclude competition. *See, e.g., id.* ¶¶ 312, 379, 382, 389; *see also id.*
3 ¶ 307 (alleging “Plaintiffs and all members of the Class were damaged by the same
4 wrongful conduct of Valve”).
- 5 • All Plaintiffs seek to represent the same putative class of persons and entities who
6 “purchased or sold a PC game on the Steam Store.” *Id.* ¶ 302. Plaintiffs suggest for
7 the first time in the Consolidated Complaint that, in the alternative, the single class
8 they pled could be broken into three subclasses (*id.* ¶ 303). But the claims in the
9 Consolidated Complaint are all based on the same facts and liability theories, for all
10 plaintiffs and putative class and subclass members.
- 11 • Plaintiffs allege they are similarly situated to each other and the putative class with
12 respect to important questions of law and fact, such as the definition of the relevant
13 market and Valve’s power and conduct within that market. *Id.* ¶ 312.

14 Arbitrators hearing the Individual Plaintiffs’ claims will consider and decide *all* of the
15 underlying questions of liability and damages that Plaintiffs allege are common to the putative
16 class as a whole, including those questions allegedly common to Wolfire Games and the
17 Individual Plaintiffs. *See In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, 298
18 F. Supp. 3d 1285, 1304 (N.D. Cal. 2018) (“A stay of all claims is particularly warranted in the
19 class-action context because the complaint admits that common questions of fact and law
20 predominate.”); *Morales v. Lexxiom, Inc.*, No. CV-09-6549-SVW-DTBx, 2010 WL 11507515, at
21 *10–11 (C.D. Cal. Jan. 29, 2010) (staying non-arbitrable claims pending arbitration; “Plaintiffs
22 are hoisted by their own petard: because they seek a class action, their First Amended Complaint
23 contains nearly two pages explaining that common issues are predominant in this litigation”).

24 Moreover, all Plaintiffs seek injunctive relief requiring Valve to make substantial changes
25 to its business practices, heightening the risk that each proceeding will impose different
26 standards of conduct on Valve—specifically, (i) the arbitration as to the Individual Plaintiffs

(because the SSA permits arbitrators to order injunctive relief only in favor of the party arbitrating and only to the extent of that party's individual claim (SSA § 11)), and (ii) the court proceeding as to "the class and the public," if Wolfire Games should succeed (Consol. Compl., Prayer for Relief ¶ (a)). *See In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, No. MDL 09-2093-AG-ANx, 2010 WL 11469932, at *2 (C.D. Cal. Nov. 15, 2010) (noting heightened risk of inconsistent determinations if injunctive relief claims proceeded pending arbitration); *see also* Consol. Compl. ¶ 313 (alleging that "the prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendant").

Importantly, Valve would be substantially prejudiced by going forward simultaneously in arbitrations and in court, but Wolfire Games would be prejudiced, if at all, to a far lesser degree by a stay of its claims while identical claims are being arbitrated. "When considering whether to stay an action, the Court must weigh 'the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.'" *Babare v. Sigue Corp.*, No. C20-0894-JCC, 2020 WL 8617424, at *1 (W.D. Wash. Sept. 30, 2020) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Wolfire Games does not allege any ongoing harm and "a delay in collecting potential damages is not a particularly severe hardship." *Id.* at *2. In contrast, requiring Valve to go forward simultaneously in both arbitration and in court would cause significant hardship by creating significant duplication of work—and thereby multiplying costs and business distraction—as well as creating a significant risk of inconsistent results, as discussed above. A stay of all claims, including those asserted by Wolfire Games, is warranted on these facts. *See, e.g., Naini v. King Co. Pub. Hosp. Dist. No. 2*, No. C19-0886-JCC, 2020 WL 468910, at *2–3 (W.D. Wash. Jan. 29, 2020) (applying *CMAX* factors and staying litigation pending completion of hospital hearing process when factual issues likely to arise in litigation

1 “will also be discussed and debated” during hearing process, even though defendants were
 2 unlikely to suffer hardship without a stay and plaintiff claimed prejudice from delay in
 3 completing hearing process and recovering damages).

4 Judge Burgess stayed litigation of non-arbitrable claims under similar circumstances in
 5 *Ballard v. Corinthian Colleges, Inc.*, No. C06-5256-FDB, 2006 WL 2380668 (W.D. Wash. Aug.
 6 16, 2006), where a group of students sued a for-profit college. Several students had signed
 7 enrollment agreements containing an arbitration clause, while others had not. *Id.* at *1. The
 8 court enforced the arbitration agreements against students who signed them (*id.*), and held the
 9 claims of the non-signatory students should be stayed pending those arbitrations because those
 10 claims depended on the same facts and were inherently inseparable from the arbitrable claims:

11 [T]he claims asserted in the complaint are brought by Plaintiffs
 12 jointly and are grounded in identical facts and legal theories.
 13 Simultaneous prosecution of the claims in arbitration and this
 14 litigation would clearly be a waste of judicial resources. In addition,
 15 given the interdependence of the claims, simultaneous litigation of
 16 such claims in separate forums would likely lead to a duplication of
 effort, as well as the risk of inconsistent decisions and inefficiencies.
 Although Plaintiffs briefly assert that there is no appropriate reason
 to stay these proceedings, the Court is convinced otherwise. Further,
 the Court finds imposition of a stay will present no significant
 [pre]judice to Plaintiffs.

17 *Id.* at *2.

18 This Court reached a similar conclusion in *Boeing Co. v. Agricultural Insurance Co.*, No.
 19 C05-021C, 2005 WL 2276770 (W.D. Wash. Sept. 29, 2005), and stayed claims brought by non-
 20 signatories to an arbitration agreement. *Id.* at *5–7. As this Court stated, “the Court’s primary
 21 concern is to avoid proceeding in a way that renders the arbitration between Boeing and Federal
 22 ‘redundant and meaningless; in effect, thwarting the federal policy in favor of arbitration.’” *Id.*
 23 at *5 (quoting *Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000)). Because the facts and issues
 24 overlapped between the arbitrable claims and those not subject to arbitration, and to avoid the
 25 result of “the Court first compelling arbitration of a dispute, and then adjudicating that same
 26

1 dispute,” this Court stayed the non-arbitrated claims to promote the “same interests” as
2 compelling arbitration. *Id.* at *6.

3 The same reasoning and analysis apply equally here to claims brought by Wolfire Games.
4 Accordingly, the Court should exercise its discretion to stay the claims of Wolfire Games in
5 order to promote judicial efficiency, avoid the risk of inconsistent judgments, and avoid
6 rendering the arbitrations between Valve and the Individual Plaintiffs “redundant and
7 meaningless . . . [thus] thwarting the federal policy in favor of arbitration.” *Id.* at *5 (quoting
8 *Harvey*, 199 F.3d at 795).

9 **IV. CONCLUSION**

10 For the foregoing reasons, Valve respectfully requests that the Court (1) compel the
11 Individual Plaintiffs to arbitrate their claims against Valve individually, and (2) stay all claims of
12 all Plaintiffs, including Plaintiff Wolfire Games, pending the outcome of arbitration of the
13 Individual Plaintiffs’ claims.

1 DATED this 23rd day of June, 2021.

2 FOX ROTHSCHILD LLP

3
4 s/ Gavin W. Skok

5 Gavin W. Skok, WSBA #29766

6 Laura P. Hansen, WSBA #48669

7 1001 Fourth Avenue, Suite 4500

8 Seattle, WA 98154

9 Telephone: 206.624.3600

10 Facsimile: 206.389.1708

11 E-mail: gskok@foxrothschild.com
12 lhansen@foxrothschild.com

13 MONTGOMERY McCracken Walker &
14 RHOADS LLP

15 s/ Charles B. Casper

16 Charles B. Casper, *admitted pro hac vice*

17 1735 Market Street, 21st Floor

18 Philadelphia, PA 19103

19 Telephone: 215.772.1500

20 Email: ccasper@mmwr.com

21 FOX ROTHSCHILD LLP

22 s/ Kristen W. Broz

23 Kristen W. Broz, *admitted pro hac vice*

24 2020 K Street, N.W., Suite 500

25 Washington, DC 20006

26 Telephone: 202.431.3100

E-mail: kbroz@foxrothschild.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that I am a secretary at the law firm of Fox Rothschild LLP in Seattle, Washington. I am a U.S. citizen over the age of eighteen years and not a party to the within cause. On the date shown below, I caused to be served a true and correct copy of the foregoing on counsel of record for all other parties to this action as indicated below:

Service List

Alicia Cobb
 QUINN EMANUEL URQUHART & SULLIVAN LLP
 1109 First Avenue, Suite 210
 Seattle, WA 98101
 Ph. 206-905-7000
 Fax 206-905-7100
 Email: aliciacobb@quinnemanuel.com

- ☐ Via US Mail
☐ Via Messenger
☒ Via CM/ECF / Email
☐ Via over-night delivery

A. Owen Glist
 Ankur Kapoor
 Jeffrey I. Shinder
 CONSTANTINE CANNON LLP
 335 Madison Ave., 9th Floor
 New York, NY 10017
 Ph. 212-350-2776
 Fax 212-350-2701
 Email: oglist@constantinecannon.com
akapoor@constantinecannon.com
jshinder@constantinecannon.com

Adam Wolfson
 QUINN EMANUEL URQUHART & SULLIVAN LLP
 865 S. Figueroa St., 10th Floor
 Los Angeles, CA 90017
 Ph. 213-443-3000
 Email: adamwolfson@quinnemanuel.com

Charles Stevens
 QUINN EMANUEL URQUHART & SULLIVAN LLP
 50 California St., 22nd Floor
 San Francisco, CA 94111
 Ph. 415-875-6600
 Email: charliestevens@quinnemanuel.com

1 David Golden
 2 CONSTANTINE CANNON LLP
 1001 Pennsylvania Ave., 22nd Floor
 3 Washington, DC 20004
 Ph. 202-204-4527
 4 Email: dgolden@constantinecannon.com


5 David Du LeRay
 6 Steig David Olson
 Shane Seppinni
 7 QUINN EMANUEL URQYHART & SULLIVAN
 51 Madison Ave., 22nd Floor
 8 New York, NY 10010
 Ph. 212-849-7630
 9 Email: davidleray@quinnemanuel.com
 10 steigolson@quinnemanuel.com
 11 shaneseppinni@quinnemanuel.com

12 Kenneth J. Rubin
 13 Timothy B. McGranor
 Kara M. Mundy
 14 VORYS SATER SEYMOUR & PEASE
 52 E. Gay St.
 15 PO Box 1008
 Columbus, OH 43215
 Ph. 614-464-6400
 16 Email: kjrubin@vorys.com
 17 tbmcgranor@vorys.com
 18 kmmundy@vorys.com

19 *Attorneys for Plaintiffs*

20
 21 I declare under penalty of perjury under the laws of the State of Washington that the
 22 foregoing is true and correct.

23 EXECUTED this 23rd day of June, 2021, in Seattle, Washington.

24
 25 
 26 Courtney R. Brooks